IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 663.

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

SARAH ETHEL WILSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

1. Where an insurer directs payment by checks and directs that the checks be mailed to the home office, can the timely mailing of such checks in strict compliance with the insurer's directions constitute sufficient payment to prevent lapse of the policy?

2. Were the agreements and course of dealings between petitioner and its insured such that the jury could conclude that the petitioner bore the risk of loss of checks which it had furnished and which were mailed pursuant to its instructions, or was the jury compelled to conclude that the risk of loss fell on the insured and his beneficiary?

STATEMENT OF THE CASE.

Petitioner's fourteen page "Statement of the Case" mixes facts, arguments and conclusions in an advocate's blend that compels respondent to set out the facts in more isolated form.

Respondent Sarah Ethel Wilson is the named beneficiary of petitioner's "Non-Cancellable and Guaranteed Renewable Executive and Professional Accident Policy" (Pl. Ex. No. 1) The policy was purchased by her deceased husband, George Wilson, in July, 1951. It provided for payment to Mrs. Wilson of $25,000 if while the policy was in force George Wilson lost his life as the direct result of an accident. No question is presented here as to the accidental death. The sole question relates to payment of premiums on the policy.

George Wilson used a payment plan, which petitioner devised for the use of thousands of its policyholders (R. 91, 221). Under this plan the insured was asked to sign twelve $10 checks, post-dated for each month of the ensuing year. These checks, prepared by petitioner, have the bold print on each check "Premium Payment" (see Pl's Ex. No. 2). George Wilson signed twelve such checks at the time he purchased his policy; they were mailed to petitioner's home office and were cashed during the course of the year.

In 1952 petitioner sent George Wilson a series of twelve post-dated checks. By a notice accompanying these checks, he was directed to pay his premiums by mailing the checks in an envelope which petitioner provided. He did as directed. By its notices, petitioner assured him that by dropping his checks in the mail his policy would be kept in force for another twelve months (R. 69, 70, 197) and that the checks represented premium payments on the pol-

icy (R. 196). Petitioner cashed these at the appropriate time indicated by the dates on the checks.

This same procedure was followed in 1953.

In mid-July, 1954, petitioner again mailed twelve post-dated checks to George Wilson. By a notice accompanying the checks, he was again told that by signing and mailing the checks his policy would be "in force for another twelve months" (R. 69). When the checks were not promptly returned, petitioner mailed a second notice (R. 180). In part it informs the policyholder that the new series of checks has not been received, and states that "by signing and returning the checks today you can be assured that your future is protected. If these checks have already been mailed please disregard this notice" (R. 70).

George Wilson's policy would have lapsed on August 15, 1954, unless payment was made on or before that date (R. 232). On August 5, or thereabouts, petitioner's agent went to see George Wilson to remind him that payment on his insurance was due (R. 232). George Wilson told petitioner's agent that he would "certainly" mail the checks before they lapsed (R. 224, 233).

On August 4, 1954, petitioner mailed George Wilson a third notice, enclosing a duplicate series of twelve post-dated checks (R. 18). On the face of each check petitioner had printed—"Premium Payment on Policies." This third notice stated in part: "Please sign and return these checks in the enclosed envelope. Please do this immediately as the grace period on your policy has almost expired. If you have already mailed a series of checks on this policy please disregard this notice." Then there is this most significant statement which is part of the notice:

> "Payment of this premium must be tendered, and if mailed, **your remittance must be post-marked not**

later than the last day of grace. Should you desire any information or service in connection with this premium payment on your policy, communicate with us at once in order that we will have time to serve you before the final date for payment expires." (Emphasis added.)

As petitioner's Treasurer admitted, none of these checks could have been mailed on the last day of grace, and been cashed prior to the date for lapse (R. 173).

Mrs. Wilson stated that she saw her husband sign the twelve checks and that she put the checks in an envelope, and deposited them in a United States mail box addressed to Petitioner's home office.

Petitioner sends no notice of any kind to its policyholders to inform them that a policy has lapsed, and no lapse notice was sent to George Wilson (R. 192).

George Wilson died on June 28, 1955. The twelve mailed checks were adequate to keep the policy in force beyond the date of his death, unless such mailing of the checks in absolute compliance with petitioner's instructions was insufficient to constitute payment in the absence of proof that petitioner's home office received the checks.

ARGUMENT.

The question here presented is the factual one of whether the course of dealings and agreements of petitioner and its insured were such that a jury could find that mailing of the checks constituted payment. The petition presents no federal question. The jurisdiction of the federal court was based exclusively on diversity of citizenship. Every one of the four judges that have considered this case has been of the opinion that the Alabama law was properly applied to the facts. This petition simply asks this Court to give the petitioner one more hearing in an effort to avoid payment of the benefits provided in its policy—now more than two years overdue.

1. The decisions below were correct.

Petitioner has resumed its argument that the mailing of post-dated checks pursuant to its direction could not constitute payment unless it cashed the checks. In rejecting this contention, the District Court and the Court of Appeals correctly applied Alabama law. Not only was the decision sound under Alabama law, petitioner has cited no cases from any jurisdiction where an insurance policy has been held terminated due to non-payment of premiums if the insurer directed or authorized payment by mailing a check, and the insured timely mailed the check.

As is stated by Appleman in his treatise, **Insurance Law and Practice**, Vol. 14, Sec. 7990, p. 250:

> "The effect of mailing a premium, as regards payment, depends wholly upon the intention of the parties. While generally payment of a premium would not be effected until actual receipt by the insurer, where the insurer or its authorized agent requests or directs payment by mail, it is paid when such premium is dropped in the post-office."

The facts are without dispute that petitioner directed George Wilson to pay his premiums by mailing to its home office twelve post-dated checks (R. 97).

In accord with Appleman are: **Travelers Ins. Co. v. Brown**, 138 Ala. 526, 36 So. 463; **Kenyon v. Knights Templar**, 122 N. Y. 247, 25 N. E. 289; **Penn. Ins. Co. v. Meyer** (C. A. 2), 126 F. 352; and see the host of cases collected in footnote 10 of the opinion of the Court of Appeals, set out at page 28 of petitioner's brief.

In **Travelers Ins. Co. v. Brown**, 138 Ala. 526, 35 So. 463, the insured mailed a check to the insurer's agent to pay a premium. The check was lost and never received. The insured did not become aware of the loss until the policy had lapsed. He thereupon attempted to re-tender payment. The insurer refused to accept this late payment and declared the policy cancelled. When insured brought suit for reinstatement, the insurer correctly insisted that the policy according to its terms provided for payment in cash. It argued, therefore, that the mailing of a check was improper tender. The Alabama Supreme Court, nevertheless, held that by a course of dealings the insurer acquiesced in payment by check, and, therefore, the mailing of the unreceived check was sufficient tender to prevent lapse of the policy.

Petitioner argues that no Alabama cases hold that an insurance premium "may be paid by a check which is not in fact paid." But in the **Brown** case the Supreme Court of Alabama held that even where the insurer directed payment by cash, there was sufficient payment to prevent default on the policy when the insured mailed his check according to a course of dealings acquiesced in by the insurer. Obviously, if mailing a check can constitute payment to prevent a cancellation of coverage where the policy demands payment in cash, it can do so where the insurer stipulates for payment by check.

Petitioner argues that in the **Brown** case the insured did not claim that mailing was payment because he tendered his premium again after discovering that his check was lost. This misses the point. In the **Brown** case the Supreme Court held that an unreceived check was sufficient tender of payment to prevent a forfeiture of coverage. It was not held to be payment in the sense that nothing further was owed to the insurer. Admittedly in the **Brown** case, as in this one, the checks having been lost the insurer was entitled to receive cash in the amount of the lost checks. The jury properly subtracted this amount from the face amount of the policy. In **Hollowell v. Life Co. of Va.** (N. C.), 35 S. E. 616, 617, the Supreme Court of North Carolina stated:

> "By this it is not meant that if the money is lost in the mail the insured is discharged from making good the loss on notice but simply that it is so far a payment that it prevents a forfeiture."

This effort to distinguish the **Brown** case also ignores that the **Brown** opinion expressly approved and relied upon **Kenyon v. Knights Templar**, 122 N. Y. 247, 262, 25 N. E. 299, 303. In the **Kenyon** case the check was lost in the mail and at the time of the insured's death no second tender had been made. In the **Kenyon** opinion the Court stated:

> "If the check had been mailed, addressed to the secretary by the direction of the defendant, the member would not have been in default, although it was not received; assuming, as we may, that he had the funds in the bank to meet it." At 25 N. E., p. 303.

In the **Brown** case and in the **Kenyon** case which was cited with approval in **Brown**, the mailing of a check at the direction of the insured was sufficient payment to keep the policy in force even though the check was lost in the mail. It is clear, therefore, that the District Court and the Court of Appeals properly applied Alabama law.

2. Petitioner contends erroneously that the decision below is in conflict with the Alabama cases of **Pac. Mut. Life Ins. Co. v. Watson**, 223 Ala. 571, 137 So. 414, and **Atkinson v. Travelers Ins. Co.**, 198 Ala. 509, 73 So. 903.

In the **Watson** case the plaintiff was insured under an employee policy. The employer was authorized to deduct from his wages to pay monthly premiums. For several months prior to the accident in that case the insured "knowingly collected his full wages . . . leaving nothing in the hands of his employer" with which to pay the premiums and none had been paid. The Alabama Supreme Court stated that its decision denying coverage was based on the fact that the insured "knowingly" withdrew all funds from which payment could have been made. The Alabama Court expressly declined to extend its holding beyond the facts of that case.

In **Atkinson**, the plaintiff was also insured under an employee insurance plan. He was injured subsequent to terminating his employment. He had authorized his employer to pay the insurance premium falling due in August "out of funds earned in August." The Alabama Supreme Court held that since no funds were earned in August, there was no right in the insurance company to collect or in the employer to pay any premium in August, and no coverage could have been available to the insured.

These cases have nothing to do with the question of whether checks mailed at the direction of the insurer constitute payment when so mailed, and by no means could they be treated as in conflict with the decision below.

3. Petitioner is inaccurate when it asserts that the decision below is in conflict with holdings of the Supreme Court of Alabama that a check is presumed to be a conditional payment only.

Petitioner cites **Jefferson Motors v. Williams**, 227 Ala. 432, 150 So. 355. But in the **Williams** case the Supreme

Court of Alabama recognized that there may be "an agreement implied from all the circumstances of the transaction" that a check shall operate as absolute payment. "If there be evidence of such agreement, express or implied, an issue is made for the jury." Not only was there evidence of an express agreement that George Wilson's check should operate as absolute payment, under the "Check Series Plan" set up by petitioner, there was no other reasonable construction.

On the first notice petitioner sent to George Wilson immediately prior to the start of each policy year appears the following:

> "We are enclosing herewith a new series of checks for you to sign and return to this office, **thus assuring that your policy will be kept in force for another twelve month period.**" (Emphasis supplied.)

Are these words of conditional acceptance? If these post-dated checks do not constitute payment until they have been cashed, how can the insured by signing and returning them be assured that his policy "will be kept in force for another twelve months period"? If this notice is to conform to petitioner's present argument of conditional payment, it should have read:

> "We are enclosing herewith a new series of checks for you to sign and return to this office, thus assuring that your policy will be kept in force for another twelve month period provided this company timely presents the checks for payment, **provided that the drawee bank is solvent, and provided you have a cash balance each month sufficient to pay the checks when presented, and provided further any risk of loss in the mail or in this office shall be borne by the insured.**"

The insurance company could have placed these restrictions and conditions on its "Check Series Payment Plan." Its policyholders probably would have viewed such a check payment plan as hazardous and undesirable. But it would

be far fairer than to allow petitioner to "assure" its policyholders of one thing and claimant beneficiaries another.

It is impossible for petitioner to harmonize its second and third notices (R. 70, 71) with its argument that checks did not constitute payment until cashed by the drawee bank. The third notice provided:

> ". . . Please sign and return these checks in the enclosed envelope. Please do this immediately as the grace period on your policy has almost expired. If you have already mailed a series of checks on this policy disregard this notice . . .
>
> **"Payment of this premium must be tendered, and if mailed, your remittance must be post-marked not later than the LAST DAY OF GRACE."**

It would have been impossible to mail the checks on the last day of grace and have them cashed prior to the expiration of the grace period (R. 173). Since petitioner has argued correctly that the policy lapsed unless payment was made by the last day of grace, it plainly treated mailing as payment, and its notices so stated. See **Pennsylvania Lumberman's Ins. Co. v. Meyer** (C. A. 2), 126 Fed. 352; **Reed v. Vermont Acc. Ins. Co.** (Vt.), 9 A. 2d 111; **Taylor v. Merchants Ins. Co.** (U. S.), 9 How. 390, 398.

The jury, the trial court, and the Court of Appeals properly refused to permit petitioner to represent one thing to its policyholders and another thing to claimant beneficiaries.

4. Petitioner incorrectly states that the decision of the Court of Appeals is in conflict with decisions of the Alabama Supreme Court that the principal is bound by notice given to the agent.

There is not one line in the opinion by the Court of Appeals in conflict with this well known, general rule. The Court of Appeals did not even discuss it because on the

facts of this case the rule had no application. See the testimony of the bookkeeper at record 139, 140.

5. Petitioner is in error in stating that the decision below is inconsistent with **Ripy v. Cloverleaf Life & Casualty Co.**, 9 F. 2d 324, and other decisions of the Court of Appeals.

In the **Ripy** case, the question was the reinstatement of a lapsed policy. The reinstatement provision provided that the policy was not reinstated until the acceptance of payment by the company. When the insured died while her check was en route to the insurer, it exercised the right expressly granted to it in the policy and refused to accept the check. The **Ripy** opinion pointed out that "by the terms of the policy" the insurer had the right to refuse reinstatement, even though proper tender was made. Petitioner has no such right. Its policies are sold with the bold legend on each policy, "THIS POLICY IS NON-CANCELLABLE AND GUARANTEED RENEWABLE." The chief significance of the **Ripy** case is that it demonstrates how simple it would have been for petitioner to have provided for those things which it plainly did not provide and which it now asks this court to write into its policy even though such provisions are inconsistent with that policy and its notice.

Without burdening this Court with a discussion of the four other cases of alleged conflict within the Fifth Circuit, we state they are totally consistent with the decision below. The only similarity in those cases and the one at issue was that a question of insurance coverage arose in each. The decisions turned on policy provisions which are not present in this case.

6. There is no conflict with the Court of Appeals for the 8th Circuit in **Taylor v. Benefit Health & Acc. Asso.**, 133 F. 2d 279.

To begin with, the **Taylor** case is applying Arkansas law and the decision below applies Alabama law; so a conflict

would be impossible. But there is no conflict in Alabama and Arkansas on this subject. The **Taylor** case is similar to the **Ripy** and the **Kennedy** cases in that the question in all three of these cases was the **reinstatement** of a lapsed policy. The reinstatement provision in the **Taylor** case stated that the policy "remains lapsed until the acceptance of the premium by the Association, and even when a premium should be accepted, the policy would only cover accidental injury thereafter sustained." 133 F. 2d at pp. 281, 282. Since the insured was killed before his check reached the Association, the Court of Appeals in the **Taylor** case, held that by the "plain meaning" of the quoted language, after default occurs the subsequent receipt and acceptance of the past due premium would reinstate only from the time the premium was received and accepted. In our case, the policy was "guaranteed renewable." There had been no lapse when the checks were mailed and petitioner had expressly stated that mailing the checks prior to the last day of grace would constitute payment (R. 71).

7. Petitioner's argument that the opinion below deals a telling blow to all "Check Series Plans" and "IBM procedures" is wide the mark.

Insurers can continue to have a "Check Series Plan," but this opinion makes clear that if they wish to sell the plan as one where "the policy will be kept in force for another twelve months period" by simply mailing checks, that the beneficiary is going to get the benefit of those assurances as well as petitioner's salesmen.

CONCLUSION.

This case involves nothing but the correct application of Alabama law to the peculiar fact situation presented by petitioner's "Check Payment Plan." It is not in conflict with decisions of the Alabama Supreme Court, the Court

of Appeals of the 8th Circuit, or any other court to which our attention has been called. It presents no federal question and no question of any importance except to petitioner and to George Wilson's widow, who has waited more than two years for payment on petitioner's policy.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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Certificate.

I hereby certify that I have served a copy of the foregoing on Sam Rice Baker, Esquire, attorney for Petitioner, at his office, 1109-25 First National Bank Building, Montgomery, Alabama, and S. Augustus Black, Esquire, attorney for Petitioner, at his office, 800 Barringer Building, Columbia, South Carolina, by depositing the same in the United States Mail, postage prepaid.

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Of Counsel for Respondent.